No. 12623

In The United States

COURT OF APPEALS

For the Ninth Circuit

PACIFIC AMERICAN FISHERIES, INC.,
Appellant,

v.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,
Appellee.

Upon Appeal from the District Court for the Territory of Alaska, First Division

BRIEF FOR THE APPELLANT

FAULKNER, BANFIELD & BOOCHEVER
H. L. FAULKNER,
Juneau, Alaska.
For Appellant.

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OPINION BELOW

The only opinion in this case is found in the memoranda opinions of August 15 and August 16, 1949 (R. 28-30) and the Minute Order in the Journal of June 30 1950 (R. 37).

JURISDICTION

This is a suit to enjoin the appellee from enforcing against the appellant the provisions of Chapter 66,

Session Laws of Alaska, 1949, which Chapter is an Act to provide for the licensing of fishermen; and to have declared invalid the provisions of the Act making it a criminal offense for appellant to have in its employ, or to purchase fish from, non-resident fishermen who have not paid the license tax or fee imposed on them by Chapter 66; and to have the Act declared invalid in its entirety. Preliminary Injunction was sought and a bond filed to secure the payment of the tax. The Preliminary Injunction was denied on August 17, 1949 (R. 31) and, on motion of the appellee, Summary Judgment was entered against appellant on July 7, 1950, dismissing appellant's complaint (R. 38). Notice of appeal was filed July 14, 1950 (R. 39) and the appeal docketed in this Court. The jurisdiction of the District Court rests on the Act of June 6, 1900, 48 USCA, Section 101, and that of this Court on Section 1291 of the New Federal Judicial Code.

QUESTIONS PRESENTED

1. Whether the District Court had the power to enter Summary Judgment against appellant, dismissing appellant's complaint.

2. Whether the provisions of Chapter 66, Session Laws of Alaska, 1949, are valid as they affect appellant.

3. Whether the subject of the Act is expressed in its title, as provided by Section 8 of the Organic Act of Alaska.

4. Whether the Legislature of Alaska had the power to enact Chapter 66, Session Laws of Alaska,

1949, by imposing a license fee on non-resident fishermen ten times greater than that imposed on resident fishermen.

SPECIFICATIONS OF ERROR

The specifications of error and the points relied upon by appellant may be summarized as follows:

1. The court erred in denying the application for the Preliminary Injunction and in dissolving the Restraining Order which was issued on August 5, 1949.

2. The court erred in making and entering Summary Judgment of July 7, 1950, without giving the appellant an opportunity to present evidence on the questions of fact involved and to present authorities and argument on the matters of law arising on the issue of facts.

3. The court erred in granting the Summary Judgment without any hearing, or without making any decision on the question raised that Chapter 66, Session Laws of Alaska, 1949, was passed in violation of Section 8 of the Organic Act of Alaska.

4. The court erred in dismissing appellant's complaint without any trial or hearing on the questions of law and fact arising on the pleadings, with reference to the validity of Section 5 of Chapter 66, Session Laws of Alaska, 1949, which makes the appellant a tax collector with criminal penalties and probable irreparable loss and damage for failure to comply, and whether the tax, even if a valid tax, on non-resident fisheremen,

was also valid in its application to the appellant, who was not the taxpayer.

5. The court erred in dismissing the complaint and denying the appellant the Judgment for Permanent Injunction as prayed for in the complaint.

STATEMENT

The Alaska Legislature in its 1949 session passed Chapter 66 of the Session Laws of Alaska, 1949, (see Appendix A). This Act imposes a license tax of $50.00 on all non-resident fishermen and a tax of $5.00 on resident fishermen. The Act in Section 1 defines fishermen to include trap watchmen and crews of tenders, or other floating equipment used in handling fish. Section 5 of the Act makes it a criminal offense, punishable by fines and imprisonment, for any person, association or corporation to have in his, their or its employ any fisherman who is not duly licensed under the Act, or to purchase fish from any fisherman who is not so licensed. Appellant instituted this suit on August 5, 1949, to enjoin appellee from enforcing the provisions of the Act against the appellant and its non-resident employees. Appellant asked that the Act be declared to be invalid (R. 2-15). A bond approved by the court was filed by appellant in the sum of $16,000.00 to protect the appellee in case the appellant did not prevail. This bond was conditioned to cover the entire license fee for the year 1949 on all non-resident fishermen in appellant's employ and also all those from whom appellant purchased fish. It was a continuing bond to protect appellee until final disposition of the

case (R. 19-20). Temporary Restraining Order and Order to Show Cause were issued on August 5, 1949, and the Order to Show Cause was returnable August 12, 1949, (R. 16-19). On August 17, 1949, the court denied the application for Preliminary Injunction and dissolved the Temporary Restraining Order (R. 31-2). No Findings were made. Thereafter appellee filed Answer (R. 33-35). On May 8, 1950, the appellee filed Motion for Judgment on the pleadings (R. 36-37). The court treated that on the argument as a motion for Summary Judgment and on June 30, 1950, granted the motion by Minute Order (R. 37-38) and this was followed by written Order of July 7 granting Summary Judgment and dismissing appellant's complaint (R. 38-9). No Findings were made in support of the Summary Judgment or the Order of Dismissal.

There are a number of complaints in intervention filed, but some were later withdrawn, and since those which remain on file asked the same relief based on allegations similar to those in appellant's complaint, they were not made a part of the record on appeal.

Appellant alleged in its complaint, which was supported by the affidavit and supplemental affidavit of S. G. Tarrant (R. 11-15; 22-25), that it is a Delaware corporation engaged in salmon fishing and canning in seven plants at various points in the First and Third Judicial Divisions of Alaska and that it employs both resident and non-resident fishermen and purchases fish from both resident and non-resident fishermen; that all of its operations are carried on under union contracts and that under some of these contracts the

company pays all lawful taxes levied on fishermen, and that under other contracts the employees are liable for the payment of the tax; that the appellant purchases fish from the independent non-resident fishermen not employed by it and who are liable for the payment of their own taxes; that in preparation for the fishing and canning season of 1949 the appellant had been obliged to expend large sums of money in the purchase of equipment, cans, boxes, fishing gear, supplies of various kinds, and in the transportation of men and supplies to the Territory, and it had paid numerous license fees required by the laws of the Territory for engaging in salmon fishing and canning (R. 2-15). The supplemental affidavit of Mr. Tarrant states that the sum expended in these preparations was approximately $1,300,000.00 (R. 24); that the fishing seasons for salmon are regulated under the law by the U. S. Fish and Wildlife Service, and the 1949 regulation allowed very short periods for salmon fishing in the different districts where appellant had canneries, ranging from eleven days at Nushagak to forty nine days in the Alaska Peninsula area; that the appellee was demanding payment of the entire tax from appellant covering all non-resident fishermen in its employ and also all those from whom it purchased fish, and that at Naknek in July, 1949, the appellee and his deputies had threatened appellant with criminal prosecution and multiple arrests of its employees and had forced the company to pay at that plant the sum of $4,000.00 on its non-resident employees and on non-resident independent fishermen from whom it was purchasing fish

(R. 6). Other threats of criminal prosecutions and disruption of its cannery operations were made by appellee and his deputies. Appellant alleged that it would either be obliged to (1) submit to criminal prosecution for employing non-resident fishermen who had not paid the tax and for purchasing fish from non-residents who had not paid the tax; or (2) pay the tax, which it did not owe; or (3) suffer loss by discharging a large number of employees and by refusal to purchase fish from non-residents who had not paid the tax, thereby disrupting its operations and diminishing its supply of fish in a short season; and that any one of these courses would subject appellant to irreparable injury, and that there was no adequate remedy at law. It was alleged in the complaint that Chapter 66 was passed in violation of Sections 8 and 9 of the Organic Act of Alaska, ACLA 1949, page 55; 37 Stat. page 512 and of the Fifth and Fourteenth Amendments to the Constitution of the United States and of Section 41, Title 8, USCA, and of Section 3 of the Alaska Organic Act, ACLA, page 50.

The appellee filed an affidavit on August 10, 1949 (R. 26-28) in which he denied he had demanded payment of any tax from appellant or threatened it with criminal prosecution, and to the best of his knowledge and belief his deputies had not done so. He then stated that the expense and inconvenience were greater in collecting taxes from non-residents than from residents, but he did not state in what particular or how much greater.

The Answer was filed and with a few admissions of

unimportant allegations, it denies generally the allegations of the complaint (R. 33-5), including the allegation regarding appellee's demand for the payment of the tax by appellant, the threat of criminal prosecution and the payment of $4,000 at Naknek, although it admits appellee had sent a deputy to Naknek in July, 1949 (R. 34). No affirmative defense is pleaded and no reason given for the imposition of a larger tax on non-residents than on residents.

SUMMARY OF ARGUMENT

I.

The chief question which arises on this appeal is whether the lower court erred in entering Summary Judgment and dismissing appellant's complaint. The points presented under this heading are:

A. The court made no Findings but in the Judgment simply stated that the pleadings had been considered and "matters outside of the pleadings," and there is nothing in the record anywhere to indicate what those matters were.

B. If the "matters outside of the pleadings" which were considered consisted of the record in the case of Anderson v. Mullaney mentioned in Motion for Judgment on the Pleadings and nowhere else, then the court decided issues in this case not raised in the Anderson case.

C. No opportunity was afforded appellant to argue or to present authorities on the question of whether Chapter 66 was passed in violation of Section 8 of the Organic Act of Alaska.

D. No opportunity was afforded appellant to argue or to present authorities on the issues of the invalidity of Section 5 of Chapter 66, which in effect makes the appellant a tax collector with severe criminal penalties for failure to collect, or in the alternative, a disruption of its business and consequent irreparable financial loss.

E. No opportunity was given appellant to show the absence of any provision in the laws of Alaska for recovery of any tax paid under protest.

F. Even if the court had concluded that the license tax was valid as applied to non-resident fishermen under the pleadings and proof in some other case, the record in this case fails to show any similarity between the issues of fact or law in this case and that other case.

G. The complaint, if supported by proof, showed appellant to be entitled to the relief prayed for, and appellant was entitled to present evidence and authorities in support of allegations and in justification of its prayer for relief.

II.

Since a Summary Judgment and dismissal of the appellant's complaint under the circumstances of this case operates as a judgment on the merits under Rule 41(b), then this court may consider the merits on appeal.

ARGUMENT

Appellant takes the position that the summary judgment should not have been entered in this case as the record stood at the time of its entry and that it should

be reversed; and that on the merits, the appellant was entitled to the relief claimed in the complaint because of the invalidity of Chapter 66, Session Laws of Alaska, 1949.

I.

THE SUMMARY JUDGMENT WAS ISSUED CONTRARY TO LAW AND THE FEDERAL RULES OF CIVIL PROCEDURE.

The appellee made a motion for judgment on the pleadings. At the time of the argument of this motion, the Court treated the motion as a motion for summary judgment under Rule 56(c) of the Rules. No affidavits were filed in support of the motion and the motion simply stated that the Court had decided the issues involved in this case in the case of *Anderson v. Mullaney* and in that case had upheld the validity of Chapter 66, Session Laws of Alaska, 1949 (R. 36-37) and that the Court in this case, by denying the preliminary injunction, had already decided that injunctive relief could not be granted the appellant.

No part of the record of *Anderson v. Mullaney* was before the Court at the time of the argument of the motion and the appellant was not notified in any way of the contents of the record in the case of *Anderson v. Mullaney*. Under the rules and the decisions, summary judgment should not have been entered in this case even if the record in the Anderson case had been set up as a part of the record in this case. The Court, in passing on the motion for judgment on the pleadings, which he treated as a motion for summary judgment, made no findings as required by Rule 41(b). The Court dismissed appellant's complaint in its sum-

mary judgment (R. 38-9). Rule 41(b) provides, among other things:

> "Unless the Court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

In such cases, Rule 52 of the Rules of Civil Procedure provides for findings as follows:

> "(a) In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts especially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions, the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of the action."

Appellant contends that since the dismissal of appellant's complaint under the circumstances constituted a judgment on the merits, findings should have been made, for Rule 41(b), supra, provides that:

> "If the Court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Rule 52 (a)."

It is clear then, that the summary jugment was entered in violation of the Rules. We submit that findings should have been entered stating fully the basis of the Court's action in dismissing appellant's complaint. If the Court held that because of the outcome of the case of *Anderson v. Mullaney* this was a case for the application of the doctrine of stare decisis, it should have been stated in the findings and the Court should have

stated fully wherein the facts and the issues of law were similar to those decided in the Anderson case.

At the time of the filing of the appeal in this case, we had had no opportunity to see the record in the Anderson case, and so far as the record in this case shows, the Court might have based its summary judgment on the application of the doctrine of stare decisis based on the Anderson case, or it might not have. The only reference to the Anderson case is that contained in Appellee's motion.

However, the Anderson case is on appeal to this Court, and we think the Court may take judicial notice of the record in that case if this Court could, from the record in this case, find that the summary judgment is based on the Anderson case. In the absence of findings, we do not think the Court can so conclude.

However, we think a reference to the pleadings in the case of *Anderson v. Mullaney*, which is now No. 12586 in this Court, will show that the issues raised in the two cases are not identical.

If the Court considers that its inquiry should go that far, we respectfully submit that it may take judicial notice of the record in the Anderson case under authority of *Wiley v. United States*, 144 F.2d 859; *National Fire Insurance Co. v. Thompson*, 281 U.S. 331; and 31 C.J.S. 619-20, Sec. 50.

We submit the following authorities on the matter of the entry of summary judgment:

> "The summary judgment is a comparatively new feature in Federal practice. It arises out of accumulated distaste for the practice of merely

> stalling off a judgment by interposing a false plea having no foundation in fact, or attempting legal blackmail by bringing an unfounded suit merely to force some kind of settlement." *Cyclopedia of Federal Procedure*, 2nd Edition, Section 3502.

None of these elements are present in this case.

> "The burden of establishing requisite foundations for a summary judgment under Federal Rules rests upon the moving party, and doubts in respect thereto are to be resolved negatively." *Andrews v. Heinzman*, 9 F.R.D. 7 (D.C. Neb.).

Said the Circuit Court of Appeals for the Second Circuit in *Doehler v. Metal Furniture Co. of U.S.*, 149 F.2d 130:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial when there is the slightest doubt as to the facts, and the denial of that right is reviewable."

In the case of *Barrett v. National M & S Casting Co.*, 68 Fed. Supp. 410, the District Court of Pennsylvania said:

> "The complaint must be viewed in a light most favorable to the plaintiff, and truth of facts well pleaded including facts as alleged on information or belief, are admitted. (Federal Rules 12-B). The complaint should not be dismissed unless it appears certain that plaintiff is not entitled to relief under any state of facts which could be proved in support thereof. This is true no matter how likely it may seem that the pleader will be unable to prove his case. He is entitled upon averring a claim to an opportunity to try and prove it."

In the case of *Clair v. Sears, Roebuck & Co.*, 34 Fed. Supp. 559, we find the following language:

> "A summary judgment upon motions of this

character should never be entered save in those cases where the movant is entitled to such beyond all doubt. The facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or doubt. They must show affirmatively that plaintiff would not be entitled to recover under any and all circumstances."

In dealing with the question of summary judgment, we find the following statement by the United States Supreme Court in the case of *Kennedy v. Silas Mason Co.*, 334 U.S. 249:

> "Summary proceedings, however salutary, where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution, from conflicted courses of legislation, contracting and practice. We consider it a part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or a comprehensive statement of agreed facts. While we might be able on the present record to reach a conclusion that would decide this case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of judicial process to provide." (Page 257).

See also *Toevelman v. M-K Pipeline Co.*, 130 F.2d 1016; *Ramsouer v. Midland Valley R. Co.*, 135 F.2d 101; *Luria Steel and Trading Co. v. Ford*, 9 F.R.D. 479; *Michel v. Meier* 8 F.R.D. 464.

Application of the doctrine of stare decisis is discussed in the case of *State v. J. M. Huber Corp.*, 193 S.W.2d 882;

> "The applicability of the doctrine of stare decisis is stated in 14 Am. Jur., Section 79, Page 293, thus: 'To make an opinion a decision, there must have been an application of the judicial mind to the precise question necessary to be determined * * * ', and in the footnote to the text, it is stated on authority of *U. S. v. Miller*, 208 U.S. 32 and other cases cited, that: 'A decision is not authority upon a question not raised and considered in the case although it may be involved in the facts.', to the same effect is the rule announced in 21 C.J.S., Courts, Sec. 195, Page 334, as follows: 'Furthermore, the former holding or decision is binding only to the extent of the precise question passed upon and is confined to the application of a legal principle, to the same or substantially same state of facts and is not binding as to facts or issues not adjudicated in the former decision or ruling.' "

We do not think it is necessary in this case to inquire beyond the fact that the summary judgment was entered without findings and without any reasons being given for its entry save the reason, if it be a reason, in the journal entry, which states that the motion for judgment is granted "on the ground that there is no issue of fact in view of the lack of power to grant injunctive relief." (R. 37-8). The Court does not say why the Court has no power to grant injunctive relief, but suppose the Court had made findings? What would they have contained if the summary judgment was based on the doctrine of stare decisis in its application to the Anderson case? Those findings based on the record and on the pleadings in this case and the issues raised in the Anderson case would necessarily show that those issues were not the same. In the Anderson case, the pleadings show that the only thing involved was the question of the validity of the non-

resident fishermen's license tax as it applied to nonresident fishermen. That was the only issue. In this case, that issue is raised, but it is not the only issue for we raise additional issues, namely, that the statute is invalid as applied to appellant, who is not a nonresident fisherman and not the taxpayer. The complaint raises the issue that the appellant cannot be punished criminally for having in its employ nonresident fishermen who have not paid the tax or for purchasing fish from nonresident fishermen who have not paid the tax, and it is alleged that the plaintiff itself must either pay a tax which it did not owe or submit to criminal prosecution, or discharge its nonresident fishermen employees who have not paid the tax and refuse to purchase fish from nonresident fishermen who have not paid the tax, and that either of these alternatives would result in irreparable loss and damage to the appellant. That issue was not raised in the Anderson case.

Then, in this case, the appellant alleges that Chapter 66 was passed in violation of the provisions of Section 8 of the Alaska Organic Act. That issue was not raised in the Anderson case and appellant has had no opportunity to present evidence on these points and authorities in support of its contention. It was prevented from doing so by the entry of the summary judgment.

The District Court for the First Judicial Division of Alaska, on July 29, 1949, decided the case of *Martinsen, et al v. Mullaney*, 85 Fed. Supp. 76. In the order to show cause issued herein (R. 16-19), the Court referred to the Martinsen decision stating:

> "The Court having already held in the case of *Martinsen et al v. Mullaney* that under the circumstances and facts alleged and set forth in the complaint in the above entitled cause, and in the affidavit filed on behalf of the plaintiff, if true and not successfully controverted, the tax of $50.00 on nonresident fishermen engaged in handling halibut, as against a tax of $5.00 on residents similarly engaged, is invalid."

Now, at the time of the entry of the summary judgment, the pleadings in this case consisted of that complaint referred to and the answer of the appellee, and an affidavit which appellee had filed on August 10, 1949 (R. 26-8). The answer of the appellee consists simply of admissions and denials and it is significant that the appellee stated in his answer that he did not know how many nonresident fishermen were in the employ of appellant. He raises no affirmative defense.

In his affidavit which was filed in opposition to the application for preliminary injunction, he simply states "the Territory of Alaska is placed to additional burdens and expense and substantial inconvenience in the matter of collecting license taxes from nonresident fishermen, as compared with the collection of license taxes from resident fishermen." That is all. Nowhere does the appellee allege anything to show what constitutes the additional burden or the substantial inconvenience. He makes no attempt to bring himself within the rule laid down by the Supreme Court in the case of *Toomer v. Witsell*, 334 U.S. 385, referred to hereinafter. Therefore, the pleadings in this case would seem to raise the same issues as those decided in the case of *Martinsen v. Mullaney*, supra, in which

the Court held Chapter 66 to be invalid. It is true that appellant alleged in the complaint that there was no additional expense and no additional regulations required and no additional enforcement burden imposed upon the Territory in the collection of taxes on non-residents and that the appellee denied these allegations, but in order to be entitled to a judgment on the question of the validity of the greater tax on non-residents than on residents, in favor of the appellee, it would have been necessary for him to have set forth the extent of that additional expense and burden and its nature in order to meet the test of the Supreme Court in *Toomer v. Witsell.*

II.

ON THE PLEADINGS WHICH CONSISTED OF APPELLANT'S COMPLAINT AND APPELLEE'S ANSWER, IF APPELLANT SHOULD PROVE ITS ALLEGATIONS, IT WOULD HAVE BEEN ENTITLED TO A JUDGMENT.

A. The Act is Invalid in its Entirety.

The facts pleaded in the complaint are set forth hereinabove under the heading STATEMENT. These allegations were answered by appellee by general admissions and denials with no grounds set up affirmatively or otherwise as to the reason for the Legislature's discrimination in the amount of the tax between residents and non-residents. The latest decision of the Supreme Court of the United States on this point is found in *Toomer v. Witsell*, 334 U.S. 385. That was a case involving the validity of a statute of South Carolina which, among other things, imposed a higher license fee upon shrimp fisheremn who were non-resi-

dents than on those who were residents of the state. In that case the Supreme Court said at pages 398-399:

> "The state is not without the power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of boats, or even to charge non-residents a differential which would merely compensate the state for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens as a class and the severe discriminations practiced upon them."

The Territory has no power to regulate fisheries (Section 3, Organic Act of Alaska; 48 USCA Section 24) so that the Territory has no power over the conservation of the fisheries, and furthermore, if it did, we know of no taxes imposed on residents which are not also applicable to non-residents under the same circumstances. The only justification for discriminating between residents and non-residents in the matter of license fees must necessarily rest, in order to be valid, on a showing that the difference in the amount imposed is, in the language of the Supreme Court, sufficient to "merely compensate for any added enforcement burden." It may not be difficult to conceive of additional enforcement burdens, but these might be infinitesimal and we think it would be neecssary in order to uphold Chapter 66 of the Session Laws of Alaska, 1949, to plead and prove that the additional burden consisted of one which was ten times greater than the cost or the burden of collecting taxes from

residents. No such allegation appears in appellee's answer, although appellant alleged in its complaint that the burden and the cost of collecting taxes from non-residents was less than the burden and cost of collecting from residents.

As pointed out by the District Court in the case of *Martinson v. Mullaney*, supra 88 Federal Supplement, pages 79-80, Chapter 66 is "clearly a revenue measure." Being a revenue measure, it would seem that the only ground on which the discrimination could be justified would be an additional cost of collecting from non-residents, and under the decision of the Supreme Court in the case of *Toomer v. Witsell*, that additional cost would need to be ten times as great, or approximately ten times as great, as the cost of collecting from residents.

B. Even if the Discriminatory Tax Could Be Justified as a Valid Tax on Non-Residents and the Differential were merely Sufficient to Pay the Additional Cost and for the Added Enforcement Burden, Section 5 of the Act is Invalid.

Section 5 of Chapter 66, a copy of which chapter is set forth in Appendix A hereto, makes it a criminal offense for any person, association or corporation to have in his, their or its employ any fishermen not duly licensed under the Act, or to purchase fish from any fisherman who is not so licensed. Section 6 of the Act imposes a fine of not to exceed $500.00, or imprisonment not to exceed six months, or both such fine and imprisonment, or any person, association or corporation violating the provisions of Section 5. It is difficult to find authorities on this point, for we doubt whether there are any similar laws in any state of the

union. Chapter 66 is not concerned with the police power of the Territory, nor with the regulation of the fisheries, but as stated, it is purely a revenue measure. There are many laws which provide for the collection of taxes from those who are not the taxpayers, such as the withholding tax under the Federal income tax law, taxes on the capital stock of banks where the bank is made liable for the tax but may charge it to the shareholders, and where corporations are made liable to pay tax on the interest on their bonds which may be due to bondholders, but in all these cases the third person or the one responsible for the payment of the tax pays it out of funds of the taxpayer under the control of the third person or in his possession.

Chapter 66, however, imposes criminal penalties on a third person or corporation or association for having in their employ one who has not paid the license fee or for purchasing fish from one who has not paid the fee. As stated hereinabove, the appellant in this case had one of three alternatives: (1) either sumbit to criminal prosecution for employing non-resident fishermen who had not paid the tax or for purchasing fish from them; or (2) pay the tax itself, which in this case amounted to $20,000.00; or (3) discharge the non-resident fishermen employees and refuse to purchase fish from non-residents. Any one of these alternatives would have subjected the appellant to irreparable loss. If appellant paid the tax it would have no means of suing for a refund and thereby testing the provisions of the law, for the tax was not imposed upon it. Furthermore, there is no law of Alaska which provides for

the refund of taxes paid under protest. The only statute on that subject which we have is Section 48-7-1, ACLA, 1949, which reads as follows:

> "CHAPTER 7. RETURN OR REFUND OF TAXES. §48-7-1. *Return of taxes paid under protest or overpayments*; *Refund of license fee.*
>
> (a) [Tax paid under protest.] Whenever any taxes shall have been paid to the Tax Commissioner under protest and such taxes shall have been covered into the treasury, and the taxpayer or taxpayers involved have recovered judgment against the Tax Commissioner for the return of such tax, or where, in absence of such judgment it shall become obvious to the Tax Commissioner, that such taxpayer would obtain judgment against the Tax Commissioner for recovery of such tax if legal proceedings therefor were prosecuted by him, it shall be the duty of the Tax Commissioner, if approved by the Attorney General and the Treasurer, to issue a voucher against the general fund of the Territory for the amount of such tax in favor of such taxpayer."

Therefore, a refund may be made only if the Tax Commissioner, the Attorney General and the Treasurer all consent. There is no law which binds them to make a refund under any circumstances. Furthermore, this statute applies only to taxpayers and the appellant in this case would not be the taxpayer.

The effect of Section 5 of the Act is much like making it a crime to purchase a load of hay from a farmer who has not paid the real property tax on his land. Section 5 does not even make any provision for an innocent purchaser of fish who might honestly believe that the person from whom he was purchasing the fish was a resident. He acts at his peril, for it is not necessary that his violation of this section be willful. That

word is not used in the statute. We think the trial court, in passing upon the application for Preliminary Injunction, did not consider the full implication of Section 5, for in the Memorandum Opinion of August 15, 1949, we find the following statement:

> "Reduced to a simple statement, therefore, the case is that if the fishermen do not now pay the tax and plaintiff's officers or agents are arrested or prosecuted for having them in its employ or buying fish from them, plaintiff will suffer irreparable injury. This is insufficient to warrant the interposition of a court of equity."

However, the pleadings show that by taking any one of the alternatives we have mentioned, the appellant would suffer irreparable injury in either the loss of the very substantial tax which it would have to pay, or the loss and disruption of its business by criminal prosecutions, or a substantial loss of its fish supply, thereby impairing its huge investment in preparation for the canning season.

A case which is as nearly analogous as anything we could find is that of *Truax v. Raich*, 339 U.S. page 32. In that case Arizona adopted a law which provided that no employer employing more than five employees could have more than 20% of aliens in his employ. Raich was employed by Truax, who had told Raich that he must discharge him in order to comply with the law or he would be subject to criminal penalties. Raich sued Truax in order to test the law and he prayed for injunctive relief, asserting the Act to be invalid. He joined the Attorney General of the State and the County Attorney as parties defendant. The Court said:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon, of crimes or misdemeanors, a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." (Citing cases.)

and again at page 38:

> "It is further urged that the complainant cannot sue save to redress his own grievance; that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution and not the complainant. But the Act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the Act and avoiding threatened prosecution under its provisions. It is therefore idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the Act is restrained, the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the Act is shown, equitable relief may be had."

The Supreme Court refers to this case in the very recent case of *Takahashi v. Fish and Game Commission*, 334 U.S. 410, in which the Court held invalid an Act of the California Legislature prohibiting aliens from fishing.

C. Chapter 66 Session Laws of Alaska is Invalid Because Passed in Violation of Section 8, Alaska Organic Act (48 USCA Section 76).

Section 8 of the Alaska Organic Act, Section 76, USCA 48, reads as follows:

> "§ 76. *Same; enacting clause; subject of act.* The enacting clause of all laws passed by the legislature shall be 'Be it enacted by the Legislature of the Territory of Alaska.' No law shall embrace more than one subject, which shall be expressed in its title. (Aug. 24, 1912, c. 387, § 8, 37 Stat. 514.)"

We submit that Chapter 66 embraces more than one subject. The two subjects embraced are first, the imposition of a license tax on fishermen and others, and second, the repeal of certain existing laws, including Section 39-4-1, ACLA 1949, which is Section 1 of Chapter 30 of the Session Laws of Alaska, 1933. This is a law prohibiting aliens from fishing in the waters of Alaska. Therefore, one portion of Chapter 66 deals with licensing fishermen and the other portion, namely the repeal of Section 1 of Chapter 30 of the Laws of 1933, deals with the rights of aliens to fish, and that is a regulatory measure; therefore the Act embraces more than one subject.

The Act is therefore invalid. (See *U. S. v. Howell*, 5 Alaska 578). This is a clear-cut instance of a law containing more than one subject. No doubt the Legislature was moved to repeal the Act of 1933 supra because of the decision of the Supreme Court in the Takahashi case supra, but we do not think the Legislature in the face of Section 8 of the Organic Act could lawfully include that repeal in a licensing act.

In the case of *Territory of Alaska v. Alaska Juneau Gold Mining Co.*, 105 Federal 2nd page 841, this court held that an Act of the Legislature of Alaska which covered both payment of compensation to injured workmen and payments to the Territory in case of the death of an employee who left no beneficiaries, was invalid as embracing two subjects; first, the subject of workmen's compensation and second, the subject of taxation. The court held this to be a violation of Section 8 of the Organic Act of Alaska. The Act in question is that case was Chapter 84 of the Session Laws of Alaska of 1935, and that was an Act to amend certain provisions of Chapter 25 of the Laws of 1929 relating to the payment of compensation to injured workmen, etc. When Chapter 84 of the Laws of 1935 was enacted, amending Chapter 25 of the Laws of 1929, the provision was inserted in the same Act for the payments to be made to the Territory for the support of aged residents in those cases where the employee was killed and left no beneficiaries. This court said in that case:

> "The subject of taxation of employers for the benefit of aged residents is not expressed in either title. It is not germane to the subject of chapter 25 or any section thereof. Therefore, it could not, consistently with section 8 of the Organic Act, be incorporated therein by amendment. *United States v. Howell*, 5 Alaska 578, 584; 25 R.C.L., Statutes, § 115, pp. 870-871; 59 C.J., Statutes, § 400, pp. 816-819.
>
> "We conclude that, insofar as it requires or purports to require any employer to pay appellant any sum of money for or on account of injury to or death of any employee, section 2161, Com-

> piled Laws of Alaska 1933, as amended by chapter 84, Session Laws of Alaska 1935, violates section 8 of the Organic Act and is, therefore, invalid."

The title of Chapter 66 does not express the subject of the Act with reference to the licensing of fishermen.

The title of the Act is:

> "Pertaining to Fisheries; to provide for the licensing of fishermen in the Territory of Alaska; requiring license fees; defining violations and prescribing penalties; repealing Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated, 1949; and declaring an emergency."

Section 1 of the Act reads as follows:

> "For the puhposes of this Act, 'fisherman' shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directliy or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term 'fisherman' shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish."

This is extending the provisions of the Act beyond the title, for crews of tenders and crews of other floating equipment used in handling fish are not fishermen and cannot be made so by a mere declaration of the Legislature. The crews of cannery tenders consist of navigators, captains, cooks, talleymen and others who are not either directly or indirectly engaged in fishing; and the crews of floating equipment used in handling

fish may include hundreds of men who are not either directly or indirectly engaged in the fishing operations. There are many floating canneries in Alaska and they are moved from place to place under their own power and require seamen, engineers, deck crews, cooks and others in their navigation. These are not fishermen. In the case of *Boyer v. Black*, 153 ALR 869 at page 872, the Florida Supreme Court in passing upon this point says:

> "Section 16, Article III of the Constitution of Florida requires that each law enacted shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title. The constitutional provision is mandatory. The title need not be an index to the body of the Act, nor need it embrace every detail of the subject matter. All that is required is that the propositions embraced in the Act shall be fairly and naturally germane to that recited in the title. But if the title is deceptive or misleading, or if by recourse thereto a reader of normal intelligence is not reasonably apprised of the contents of the Act, the title is defective and the Act is in violation of the Constitutional requirement, in so far as such subject matter is improperly included."

The Florida Constitution, it will be seen, contains some words which are not found in Section 8 of the Alaska Organic Act. The Alaska Organic Act does not contain the words after the word subject "and matter properly connected therewith," nor does it contain the word "brifely". However, one looking at the title of Chapter 66 would certainly be deceived, for it provides for a license tax on fishermen and not on cooks, seamen, engineers or others who are included in Section 1.

Alaska has had a fishermen's license tax for a number of years and the appellant had, of course, operated under the provisions of that Act. That Act is Chapter 30 of the Session Laws of Alaska 1933 hereinabove referred to, and Section 5 of Chapter 30 of the Laws of 1933 defines fishing as follows:

> "The term 'fishing' as used in this Act means the catching of fish, whether by hook, net, seine or trap."

Naturally a person looking at the title of Chapter 66 of the Laws of 1949 would conclude that the new Act applied to fishermen, as they are properly defined in Section 5 of the old Act. The title is surely "deceptive and misleading."

> "If the caption of a statute is misleading, it falls within the condemnation of the Constitutional provision that the subject of an Act be expressed in its title." (*State v. Praetorians*, 186 S.W. 2nd 973.)

Indeed, there are provisions in Section 1 of Chapter 66 that have not the remotest connection with either "fishermen or fisheries" and since the title relates only to fishermen and fisheries, to include others in the body of the Act is to have an Act which embraces something not expressed in the title. The last sentence of Section 1 of the Act supra states that

> "The term 'fisherman' shall also include trap watchmen or others engaged in operating fish traps *as well as the crews of tenders or other floating equipment used in handling fish.*" (Italics ours.)

All canned salmon packed in Alaska is shipped to the United States necessarily on regular commercial steamers which ply between ports in the United States and

ports in Alaska carrying general cargo and passengers. These commercial vessels are certainly floating equipment and they handle fish; in fact, they handle all fish after it is packed in cans or froezn in cold storage plants. What are we to do about the crews of these vessels? The Act would seem to define them as fishermen, although they have no connection with fishing, but if they are fishermen they are subject to the tax. That would include captains, mates, officers, engineers, sailors, radio operators, cooks, stewards and waiters of every vessel plying between Alaska and the United States carrying either canned or frozen fish.

It would seem that attempting to apply the license provisions of Chapter 66 to crews of ocean liners, freight and passenger vessels carrying fish and fish products out of the Territory would be much like passing a law requiring a license fee from physicians and surgeons and stating in the law that all janitors, window washers, elevator operators and others employed in a building occupied by a physician or surgeon be classified as physicians or surgeons themselves. Indeed, if Chapter 66 can be held to be valid, a law could be passed and upheld imposing a license tax on physicians and surgeons which could be extended to cover a variety of different occupations such as painters who might paint a building occupied by a physician or surgeon, and a carpenter who would repair a leak in the roof, or the crew of a vessel carrying instruments and supplies to a hospital to be used by the doctors.

Another defect in the title is that it refers to certain sections of the Alaska Compiled Laws Annotated,

1949. The Alaska Compiled Laws Annotated 1949 was never officially adopted. That is a compilation of the laws of Alaska. Chapter 1 of the Session Laws of Alaska of the Extraordinary Session, 1949, attempted to re-enact all the laws contained in the compilation and to adopt them and to repeal all not contained in the compilation. See Chapter 1, Laws of Alaska, Extraordinary Session, 1949.

However, in the case of *Alaska Steamship Co. v. Mullaney* (84 Fed. Supp. 561) the District Court for the First Judicial Division of Alaska held that the Extraordinary Session was irregularly called and therefore all acts passed by it were invalid. As a matter of fact, the Alaska net income tax was passed at that session, but later it was re-enacted by the regular and valid session. See *Alaska Steamship Co. v. Mullaney*, 180 Fed. 2nd, page 805.

Therefore, when the Legislature in the title of Chapter 66, Session Laws of Alaska, 1949, repeals certain sections of the Alaska Compiled Laws Annotated, 1949, it repeals nothing, and therefore we have one definition of fishermen appearing in Chapter 30 of the Laws of 1933 and a very different definition appearing in Section 1 of Chapter 66 of the Laws of 1949.

> "In adopting a code or revision, the Legislature must pass a bill therefor, the same as any other law." 59 CJ, Section 482, page 889.
>
> "That codifiers have any authority to add to, amend, omit, or write new statutes, none as we understand contend; it is when the Legislature enacts their work into law, which gives to their work vitality and the force of law." *Stevens v. State*, 159 S.W. 505."

D. A Court of Equity Has Jurisdiction to Enjoin the Defendant in this Case.

The rule is that Courts of Equity do not generally restrain criminal prosecutions. However, there are exceptions to that rule in cases where injunction is necessary to effectually protect property rights.

See *Hygrade Provision Co. v. Sherman*, 266 U.S. at page 500.

In *Terrace v. Thompson*, 263 U.S. at page 197, it is stated:

> "The unconstitutionality of a state law is not of itself ground for equitable relief in the courts of the United States. That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. But the legal remedy must be as complete, practical and efficient as equity afford. (Citing cases, page 215) * * * * "

One is

> 'Not obligated to take the risk of fines, prosecution and imprisonment and less of property in order to secure an adjudication of his rights."

In *Packard v. Banton*, 264 U.S. page 140, at page 144, we find the following:

> "But it is settled that a distinction obtains and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when the prevention of such prosecution is essential to the safeguarding of the rights of property."

See also *Truax v. Raich*, 239 U.S. 37-38 supra.

In all these cases cited the plaintiffs were directly subject to the law, and the obligation, the enforcement of which they sought to enjoin, was their own obligation, except in the case of *Truax v. Raich*, in which the

plaintiff was permitted to enjoin the enforcement of the law in which the criminal penalties were imposed upon the defendant, his employer, as hereinabove pointed out.

In this case the injury arising from the enforcement of the law is an injury to the plaintiff and the allegations of the complaint show that the enforcement of the law will result in great and irreparable loss and injury to the plaintiff, and furthermore that the plaintiff has no remedy at law whatsoever.

In the case of *So. Cal. Telephone Co. v. Hopkins*, 13 Federal 2nd, page 814, this Court held that it was not the duty of the plaintiff to exhaust all possible remedies under the state law before he is entitled to relief in the Federal Court. This case was affirmed in 275 U.S. page 393.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the summary judgment of the district court be reversed and set aside and that the case be remanded to that court with instructions to grant the relief prayed for in plaintiff's complaint and enter judgment and decree accordingly.

Respectfully,

FAULKNER, BANFIELD & BOOCHEVER
H. L. FAULKNER,
Juneau, Alaska.

For Appellant.

APPENDIX A

Chapter 66, Session Laws of Alaska, 1949

AN ACT

(C.S.H.B. 7)

Pertaining to Fisheries; to provide for the licensing of fishermen in the Territory of Alaska; requiring license fees; defining violations and prescribing penalties; repealing Section 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated, 1949; and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a licenes so to do. License fees levied upon fishermen are as follows: Resident fisherman, $5.00; non-resident fisherman, $50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident

shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. Such applications shall be simple in form and be executed by applicants or their respective agents under the penalties of perjury; Provided, however, that representations respecting citizenship shall not apply to one who is a native descendant of one of the aboriginal tribes of Alaska, and who in the application describes himself as such. The Tax Commissioner's regular deputies shall each be supplied with a metal badge with the words "Territorial Tax Collector" engraved thereon and which badge they shall wear plainly exposed when on duty.

Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and

collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Department, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. The United States Commissioners and other agents shall monthly transmit to the Tax Commissioner all fees collected by them, less their authorized commissions, together with a full account of same. The Tax Commissioner shall not be liable for defalcation or failure to account for the fees so collected by any such agent, but shall require a bond in such sum as he may deem adequate, conditioned upon faithfully accounting for all moneys collected hereunder.

Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. Each buyer of the fish shall keep a record of each purchase showing name of boat from which the catch involved is taken, amount purchased, and the names of all persons attached to the boat who participated in the trip on which the fish or shellfish were taken. Such records may be kept on forms provided by the Tax Commissioner, but must be kept in any event, and each person charged with keeping such records must report same to the Tax Commissioner in accordance with rules and regulations promulgated by him. Anyone

violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act.

Section 6. (a) The Tax Commissioner's deputies shall have the full power to enforce this Act. Likewise the agents of the Fish and Wildlife Service, Department of the Interior, are hereby fully authorized to enforce this Act. (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding $500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption, but shall apply only to fishing for commercial purposes; Provided, however, that with respect to rivers of Alaska wherein commercial fishing is prohibited, fishing by Indians, Eskimos or Aleuts for the purpose of drying fish for sale as dog food, shall not be considered commercial fishing.

Section 8. Section 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application

to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.